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In the Supreme Court of the United States

OCTOBER TERM, ~~1949~~ 1950

No. —42

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE PITTSBURGH STEAMSHIP COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on February 17, 1950 (R. 868), denying enforcement of an order issued by the Board against The Pittsburgh Steamship Company (R. 856-857).

OPINIONS BELOW

The opinion of the Court of Appeals (R. 870), is not yet reported. The original opinion of the Court of Appeals is reported in 167 F. 2d 126. The

opinion of this Court reversing and remanding the case for further proceedings is reported in 337 U. S. 656. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 854-857) are reported in 69 NLRB 1395.

JURISDICTION

The judgment of the Court of Appeals was entered on February 17, 1950 (R. 868). The jurisdiction of this Court is invoked under Section 1254 of 28 U. S. C., as codified June 25, 1948, and Section 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

The principal question presented is whether the scope of judicial review of findings of fact made by the National Labor Relations Board has been changed by the Administrative Procedure Act or the Labor Management Relations Act.[1] A second question is whether procedural changes made by the Administrative Procedure Act and the Labor Management Relations Act which govern admissibility of evidence in proceedings before the Board and the standards to be applied by the Board in making decisions, apply to hearings concluded and

[1] Assuming that this question is answered in the affirmative, additional questions presented are whether the scope of judicial review is so "broadened" as to permit a court to substitute its own findings and inferences for the reasonable findings and inferences of the Board, and whether the Board's findings are supported by substantial evidence on the record considered as a whole.

decisions made by the Board prior to the effective date of these statutes.

STATUTES INVOLVED

The statutory provisions principally involved are the National Labor Relations Act of 1935 (49 Stat. 449, 29 U. S. C. 151), Sections 7, 8, 10(c); the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U. S. C. Supp. II, Sections 141, *et seq.*), Sections 8(a), (c), 10(b), (c), (e), and Section 104; and the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. Section 1001, *et seq.*), Sections 7(c) and 10(e). It does not seem necessary to quote these various provisions for purposes of this petition.

STATEMENT

When this case was previously before this Court the facts were fully set forth in the Board's brief, No. 258, October Term, 1948, pp. 2-33. On June 20, 1949, this Court issued its opinion reversing and remanding the cause to the Court of Appeals for the Sixth Circuit for further proceedings not inconsistent with its opinion. 337 U. S. 656. This Court at that time stated that "Without doubting the existence here of evidence substantial enough under the Wagner Act * * * to warrant the Board's findings, we are not certain whether that standard controls this case." 337 U. S., at 661. Accordingly this Court held that the questions of whether the Administrative Procedure Act and the Taft-Hart-

ley Act "are applicable to and, if applicable, in any way affect Board procedures and the scope of judicial review of Board orders" (337 U. S., at 661) should "be considered in the first instance by the Court of Appeals." 337 U. S., at 662.

The Court of Appeals on February 17, 1950, handed down its opinion and decree again denying enforcement of the Board's order (R. 868-884). The court held that the Taft-Hartley Act and the Administrative Procedure Act were applicable to review of the instant case and that each of these Acts broadened the scope of judicial review beyond the requirements of the Wagner Act. The court further held that Sections 8 (c), 10 (b), and 10 (c) of the Taft-Hartley Act, as well as Section 7 (c) of the Administrative Procedure Act, which deal not with scope of judicial review, but with agency procedure, are applicable to the proceedings and decision of the Board in this case, although the Board's decision preceded enactment of these statutes. Applying the "broadened" scope of review and revised evidentiary and procedural standards, the court held that the Board's findings of fact were not supported by "reliable, substantial and probative evidence".

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the Taft-Hartley Act and the Administrative Procedure Act have changed the

scope of judicial review of orders of the National Labor Relations Board.

2. In holding that the procedural changes made by Sections 8 (c), 10 (b), and 10 (c) of the Taft-Hartley Act, and Section 7 (c) of the Administrative Procedure Act are applicable to Board proceedings and decisions made prior to the effective date of these statutes.

3. In substituting for the Board's findings concerning the credibility of witnesses, weight of evidence and inferences therefrom, contrary findings of its own.

4. In holding that the Board's findings are not supported by substantial evidence on the record considered as a whole.

5. In seemingly holding that the company could not be charged with responsibility for the acts of officers on seven out of 73 ships unless that conduct could be traced to a policy of the central management.

6. In not enforcing the order of the Board.

REASONS FOR GRANTING THE WRIT

As has been pointed out, when this case was before the Court last Term, this Court said: "Without doubting the existence here of evidence substantial enough under the Wagner Act, *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, 229, to warrant the Board's findings, we are not certain whether that standard controls this case." (337

U. S., at 661). As we read the opinion, the Court thereby passed upon and sustained the Board's contention that the evidence, tested by the substantial evidence rule as theretofore understood, was sufficient to support the Board's findings, and that those findings warranted the conclusion that the Company had committed unfair labor practices. This interpretation seems particularly valid in view of the fact that Mr. Justice Jackson alone reserved "opinion as to the sufficiency of the evidence under the Wagner Act in view of the Court's determination to return the case to the Court of Appeals." 337 U. S., at p. 662.

The court below held that it was not bound to enforce the Board's order because (1) the scope of review had been so broadened by the subsequent legislation as to permit the courts to set aside an order when the evidence would have been sufficient under Wagner Act standards of review; and (2) the Board's proceedings were vitiated by subsequent procedural amendments, although the proceedings were completed prior to the effective date of the amendments.

In both respects, the decision below was both erroneous and in conflict with decisions of many other courts of appeals.

1. Section 10(e) of the Labor Management Relations Act provides that—

> The findings of the Board with respect to questions of fact if supported by substantial evi-

dence on the record considered as a whole shall be conclusive.

As the court below admitted, its holding that the scope of judicial review under this provision of the Taft-Hartley Act is broader than under the Wagner Act (R. 875-876) is in conflict with decisions of the Second, Fourth, Fifth, Seventh, Eighth and Tenth Circuits. *National Labor Relations Board* v. *Universal Camera Corp.*, decided January 10, 1950 (C. A. 2); *Eastern Coal Corp* v. *National Labor Relations Board*, 176 F. 2d 131 (C. A. 4); *National Labor Relations Board* v. *Booker*, decided February 6, 1950 (C. A. 5); *Victor Mfg. & Gasket Co.* v. *National Labor Relations Board*, 174 F. 2d 867 (C. A. 7); *National Labor Relations Board* v. *Minnesota Mining & Mfg. Co.*, 179 F. 2d 323, 325-326 (C. A. 8); *National Labor Relations Board* v. *Continental Oil Co.*, 179 F. 2d 552, 555 (C. A. 10); see also *National Labor Relations Board* v. *Crompton-Highland Mills*, 337 U. S. 217, 220, n. 4. The decision of the court below that the Administrative Procedure Act had the effect of broadening the substantial evidence rule as theretofore applied under the Wagner Act and similar statutes is in conflict with decisions of the Fourth, Seventh, Eighth and Ninth Circuits. *National Labor Relations Board* v. *National Plastics Products Co.*, 175 F. 2d 755, 760 (C. A. 4); *Anderson* v. *Commissioner of Inter-*

nal Revenue, 164 F. 2d 870, 874 (C. A. 7); *National Labor Relations Board* v. *Minnesota Mining & Mfg. Co.,* 179 F. 2d 323 (C. A. 8); *Willapoint Oysters* v. *Ewing,* 174 F. 2d 676, 685 (C. A. 9), certiorari denied, 338 U. S. 860.

2. In holding that the Board erred in relying upon the Ferbert letters as evidence of unfair labor practices because they contained no direct threat or promise of benefit, and in relying upon evidence allegedly incompetent under the revised standards of the Taft-Hartley and Administrative Procedure Acts, the court below gave retroactive effect to procedural amendments.[2] Its holding in this respect conflicts in principle with decisions of the Second, Third, Fifth and Eighth Circuits. *National Labor Relations Board* v. *National Garment Co.,* 166 F. 2d 233, 236-238 (C. A. 8), certiorari denied, 334 U. S. 845; *National Labor Relations Board* v. *Clark,* 176 F. 2d 341, 343 (C. A. 3); *National Labor Relations Board* v. *Whittenberg,* 165 F. 2d 102, 104 (C. A. 5); *National Labor Relations Board* v. *Gate City Cotton Mills,* 167 F. 2d 647, 649 (C. A. 5); *National Labor Relations Board* v. *Sandy Hill Iron & Brass Works,* 165 F. 2d 660, 662 (C. A. 2); *National Labor Relations Board* v. *Brozen,* 166 F. 2d 812, 813 (C. A. 2). In the *National Garment* case, the

[2] Compare Section 12 of the Administrative Procedure Act which provides in part "* * * no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement."

court stated (166 F. 2d, at 238): "Insofar as Congress amended certain procedural provisions of the Act it reflected no intention to reach back and nullify procedural steps already taken. Those steps already taken, pleadings, and all things done under the old law must stand. Procedural changes operate in the future."

These cases apply the general rule (1 Sutherland, *Statutory Construction* (3rd Ed., 1943) 438, 2 *id.* 136) that, unless the legislature has expressed a contrary policy procedural changes will be deemed to affect pending cases only to the extent that the steps dealt with in the amendments have not yet been taken. For otherwise, "the effect is to reach backward, and nullify by relation the things already done." *Berkovitz* v. *Arbib & Houlberg, Inc.*, 230 N. Y. 261, 270, 130 N. E. 288, 290. Departure from this rule by the court below in the instant case has resulted in setting aside an order of the Board which, when made, fully conformed to the then existing procedural standards governing admissibility of evidence and the administrative decisional process.

3. The questions which the court below has thus answered differently than the other courts of appeals are of manifest importance in the administration of the Act, and, in so far as the Administrative Procedure Act is concerned, in the field of federal administrative law generally.

4. We believe that in holding that the scope of judicial review has been materially broadened the court below erred, for reasons set forth in the opinions cited on p. 7. However, even assuming that a change in the scope of judicial review has been effected by the Taft-Hartley Act or the Administrative Procedure Act, we submit that that change has not gone to such lengths as to permit a court reviewing a Board order to substitute for the reasonable findings of the Board its own judgment concerning the credibility of witnesses, the weight of the evidence, and the inferences to be drawn therefrom. Tested by the standards of review provided in the Taft-Hartley Act and the Administrative Procedure Act, the evidence discussed in full in the Government's brief on the merits last Term, pp. 4-28, 70-103, amply supports the Board's findings. The Board's order should therefore have been enforced.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APRIL, 1950.

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